No. 94-455

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In the Supreme Court of the United States

OCTOBER TERM, 1994

TYSON JOHNSON, ET AL., PETITIONERS

v.

HOUSTON JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether an order denying a summary judgment motion by public officials entitled to qualified immunity may be appealed on the ground that the plaintiff failed to adduce any evidence showing that the defendants acted unconstitutionally.

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INTEREST OF THE UNITED STATES

This case concerns the proper scope of government officials' entitlement, established by *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), to appeal interlocutory orders denying them qualified immunity from suits against them in their individual capacities. Federal employees sued under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), often seek interlocutory review of decisions denying them qualified immunity. The United States has an interest in protecting its employees' abilities to perform their functions free from meritless litigation. The United States also has an interest in ensur-

ing effective deterrence of, and remedies for, unconstitutional conduct by government employees. Both of these interests will be directly affected by the resolution of the issue in this case.

STATEMENT

1. On November 6, 1990, a police officer in Villa Park, a small Illinois town, found respondent hitting his head against the door of a building. Respondent was arrested and, in the arrest process, was seriously injured. After his arrest, respondent spent several days in the hospital for "multiple trauma and several broken ribs." Pet. App. 5a-6a.

The arresting officer, who believed that respondent was intoxicated, asserted that respondent fidgeted with something in his pocket when first questioned by the officer, and then struck the officer when he attempted a pat-down search. The officer claimed that, in order to place respondent under arrest, he had to force him to the ground and handcuff him. Other police officers who had arrived on the scene assisted in the arrest and helped to place respondent in a squad car. Pet. App. 4a, 5a.

Respondent contended that he was a diabetic who, at the time of the arrest, was having an adverse insulin reaction. While insulin shock allegedly prevented him from recalling much of what happened, respondent asserted that the officers used excessive force against him both during his arrest and later at the police station. Pet. App. 6a.

The State charged respondent with disorderly conduct, battery, and resisting arrest. In his defense at his criminal trial, respondent asserted that, due to the insulin reaction, he lacked the required mental state to be convicted of those offenses. The trial judge

found the testimony of the police officers credible in all respects, but nevertheless ordered a judgment of acquittal because the State had failed to make the requisite proof that respondent acted knowingly beyond a reasonable doubt. Pet. App. 6a.

2. Respondent then initiated the present federal court suit against five state police officers, asserting a claim under 42 U.S.C. 1983 for use of excessive force to effectuate the arrest, in violation of the Fourth Amendment, as well as state-law claims of assault and battery, unlawful arrest, false imprisonment and malicious prosecution. Pet. App. 4a-5a.[1] Following discovery, the magistrate judge, presiding with the consent of the parties under 28 U.S.C. 636 (c), denied the officers' motion for summary judgment. Pet. App. 4a-10a.

The court considered the excessive-force and assault-and-battery claims together,[2] and held that factual issues precluded summary judgment on them. Pet. App. 7a-8a. The court acknowledged that substantial evidence existed in favor of the officers on the claims. In the criminal trial against respondent, "the trial court found that [respondent] came into contact [with], struck, and resisted a peace officer." Pet. App. 6a. In addition, in affidavits submitted to support their summary judgment motion, all the officers "testified that no one beat or abused [respondent]." *Ibid.* Respondent's ability to challenge these accounts was severely limited, however, because he "contends that he was experiencing an insulin reaction at the time of his arrest," and, at his criminal trial, he had "testi-

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[1] Four other claims were dismissed at an early stage in the litigation and are not at issue here. Pet. App. 4a.

[2] We refer to these claims as excessive-force claims in the remainder of this brief.

fied that he had no recollection of what transpired from the time he first felt the insulin reaction until he noticed he was being dragged up the stairs of [the] police station." *Ibid.* Respondent's "own doctor testified that he would not rely on anything [respondent] told him about the incident." *Id.* at 7a.

On respondent's side of the ledger, the court found that "the fact of [respondent's] injuries supports an inference of excessive force used." Pet. App. 9a. In addition, respondent denie[d] having resisted the officers' efforts as they say he did." *Id.* at 6a.[3] The court also noted that respondent "testified in the state court to feelings of great pain during the arrest." *Id.* at 7a. The court concluded that "there is sufficient circumstantial evidence supporting [respondent's] theory of the case" to create a jury issue. *Id.* at 8a.

The court then considered the claims of unlawful arrest, false imprisonment, and malicious prosecution,[4] and denied summary judgment on that set of claims as well. Pet. App. 8a-10a. Those claims turned on whether the respondent could establish lack of probable cause for his arrest. *Id.* at 8a. The court observed that, in the officers' view, the probable-cause test was "easily met here," because the respondent's undisputed conduct at the time of the arrest—hitting his head or forehead against the door of a building, while in an apparently intoxicated state, *id.* at 5a

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[3] The court found that respondent's testimony at the criminal trial that he lacked recollection of events during the arrest could "diminish his credibility" regarding those events, but it concluded that "there is no obvious contradiction" and that his testimony could be considered as creditable on summary judgment. Pet. App. 7a.

[4] We refer to these claims as false-arrest claims in the remainder of this brief.

—amounted to a breach of the peace. *Id.* at 9a. The court found that a material dispute of fact precluded summary judgment on those claims, however, because respondent had "presented evidence [through an expert medical witness] that, at the time of his arrest, he may have been weakened by the insulin reaction and unable to summon the level of resistance that defendants claim he did. If obviously weakened, it is conceivable that no reasonable officer might have found cause for arrest." *Ibid.*; see *id.* at 6a. The court added:

> Since there is substantial overlap between the claims of excessive force and lack of probable cause, and because there is at least some possibility [respondent] could prove lack of probable cause, the court will deny summary judgment on the question of probable cause to arrest.

Id. at 9a-10a.

3. The three petitioner officers filed an interlocutory appeal. The Seventh Circuit, in a short, per curiam opinion relying primarily on the opinion of Judge Easterbrook in *Elliott* v. *Thomas*, 937 F.2d 338, 341-343 (7th Cir. 1991), cert. denied, 502 U.S. 1074, 1121 (1992), dismissed the appeal of the excessive-force claim for lack of jurisdiction. Pet. App. 1a-3a.

Elliott held that "a court's refusal to grant summary judgment to a defendant who denies committing any wrong" is not an immediately appealable collateral order under *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985). 937 F.2d at 340. The *Elliott* court reasoned that "[a] defense of no wrongdoing is not collateral to the merits; it is the nub of the case." *Ibid.* Quali-

fied immunity "gives public officials the benefit of legal doubt," *id.* at 341, but

> [w]hen rules of law clearly establish public officials' duty, the immunity defense is unavailable. So, too, the interlocutory appeal to vindicate the right not to be tried is unavailable when there is no legal uncertainy; there is no separate "right not to be tried" on the question whether the defendants did the deeds alleged; that is *precisely* the question for trial.

Ibid. The court in *Elliott* acknowledged that, in assessing whether a claim rests on clearly established law, "the court of appeals may consult the full record—viewed, as Fed.R.Civ.P. 56 requires, in the light most favorable to the party opposing the motion for summary judgment." *Id.* at 342. But the *Elliott* court cautioned that "the *reason* a court of appeals examines the facts is to determine whether it was 'clearly established' at the time that such deeds were forbidden. It would extend *Mitchell* well beyond its rationale to accept an appeal containing nothing but a factual issue." *Ibid.* (citation omitted). The argument that the "right not to be tried" requires the court of appeals on interlocutory review to "comb[] through the factual record" was, in the view of the *Elliott* court, "miles away from the position of *Harlow* [v. *Fitzgerald*, 457 U.S. 800 (1982)], *Mitchell*, and *Anderson* [v. *Creighton*, 483 U.S. 635 (1987)]." *Id.* at 341. Acceptance of the view that "a general defense on the merits supports interlocutory appeal" would mean that "every public defendant is entitled to a pretrial appellate decision." *Id.* at 342.

Applying *Elliott* to this case, the court of appeals held that it lacked jurisdiction because petitioners' defense to the excessive-force claims was based, not on

any uncertainty in the law, but on the alleged absence of evidence to support respondent's claims. "A cry of 'we didn't do it' does not present any distinctly legal issue or seek protection from legal uncertainty, the genesis of doctrines of official immunity." Pet. App. 1a-2a. The court additionally stated:

> [Petitioners] do not deny that if they beat [respondent], as he believes they did, then they lack immunity. Whether they beat [respondent] is a question that must be resolved in the district court before it may be reviewed on appeal. When asked at oral argument if they could lose the factual dispute and still prevail, [petitioners'] lawyer answered no. In consequence, we lack appellate jurisdiction over the contention that the [petitioners] did not commit or abet battery.

Id. at 2a.

On the false-arrest claims, however, the court exercised jurisdiction and reversed. It held that the undisputed facts were "that an officer found [respondent], apparently intoxicated, hitting his head against a building, and took him into custody." Pet. App. 2a. Those facts sufficed to "imply disorderly conduct, which supports an arrest." *Ibid.* In the court's view, the magistrate judge had improperly "concluded that because the excessive force claim had to be tried, and because the plaintiff might come up with more evidence before trial, the false arrest claim also should be tried." *Ibid.* Because "[s]ummary judgment is not a discretionary remedy," but must be granted if the nonmoving party lacks sufficient evidence to permit a jury verdict in his favor, the court of appeals held that judgment should have been granted to the officers. *Id.* at 2a-3a.

SUMMARY OF ARGUMENT

Under the Court's qualified-immunity doctrine, public officials have an entitlement not to stand trial on claims that are insubstantial because they lack factual support. The present case can thus be resolved by application of *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), much as the Court applied *Cohen* in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985). The same policies of protecting public officials from unnecessary litigation burdens that supported by this Court's decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), and *Mitchell* are equally at stake here. The full protection of petitioners' entitlement not to stand trial calls for recognition of their right of interlocutory appeal.

The issue in this case, although closely related to the one resolved in *Mitchell*, is not identical to it. The differences, however, do not mandate a different result. The Seventh Circuit correctly recognized that a typical summary judgment ruling may be less separate from the merits of a case than the question whether a plaintiff's rights were clearly established at the time of the challenged conduct. The issues on summary judgment are nevertheless different from the issues on the merits, however, since summary judgment addresses only whether there is a genuine factual issue for trial, not what the outcome of that trial should be. In addition, whereas *Mitchell* recognized appeals only of issues of law, an appeal of a decision that the plaintiff had proffered sufficient evidence to defeat summary judgment may require a more fact-based appellate review than is required in reviewing many issues of law. *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987), makes plain, however, that even review of whether the relevant law was

clearly established—the question at issue in *Mitchell* itself—requires a "fact-specific" inquiry. Appellate review of summary judgment orders like that in this case is no less review of a question of law than the kind of review that *Anderson* involved.

The Seventh Circuit's holding would create a distinction between appeals asserting that the law was not clearly established and appeals based on insufficiency of the evidence. However, as the court of appeals itself recognized in *Elliott* v. *Thomas*, 937 F.2d 338, 341 (7th Cir. 1991), cert. denied, 502 U.S. 1074, 1121 (1992), an evidence-sufficiency question can readily be recharacterized as a question of legal clarity. Under the Seventh Circuit's rule, therefore, the scope of appellate jurisdiction remains effectively undefined and, consequently, extremely difficult to implement with consistency.

Courts can employ various safeguards to ensure that interlocutory appeals in cases such as this one do not unreasonably delay trials on the merits of valid claims against public officials under *Bivens* or Section 1983. Where appropriate, the courts of appeals can make summary dispositions. In addition, some circuits have procedures for the district court to certify to the court of appeals that a qualified-immunity appeal is frivolous, and courts of appeals faced with frivolous appeals have the power to impose sanctions. Several circuits also have rules limiting the number of qualified-immunity appeals in any one case. Management of appellate dockets with procedural mechanisms such as these can minimize the tension between protecting the rights of public officials not to stand trial on factually unsupported claims and permitting plaintiffs with well-founded claims to proceed to trial expeditiously.

ARGUMENT

Mitchell v. *Forsyth*, 472 U.S. 511 (1985), authorizes an interlocutory appeal, under the collateral-order exception to the finality requirement of 28 U.S.C. 1291, from a district court's allegedly erroneous holding that the right asserted by a plaintiff was clearly established. The question in this case is whether a court of appeals similarly has interlocutory appellate jurisdiction over an appeal from an order denying summary judgment where the claim on appeal is not that the relevant law was not clearly established, but that the evidence failed to substantiate the plaintiff's allegations that his clearly established rights were violated. Interlocutory appellate jurisdiction is present in such cases under the logic of *Mitchell*, and such review helps to give full effect to the purpose of qualified immunity to protect public officials from the burdens of trial of insubstantial claims.

I. IN THE QUALIFIED-IMMUNITY CONTEXT, THE INTEREST IN DEFERRING REVIEW OF PRETRIAL ORDERS IS OUTWEIGHED BY THE NEED TO PROTECT THE ENTITLEMENT NOT TO STAND TRIAL ON INSUBSTANTIAL CLAIMS

A. Under *Mitchell* v. *Forsyth*, A Pretrial Decision That The Law Was Clearly Established Is A Collateral Order Appealable On An Interlocutory Basis

The final-judgment rule generally prevents appellate review of interlocutory orders before a case is fully adjudicated.[5] The rule "requires that 'a party

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[5] Section 1291 of Title 28 grants the courts of appeals "jurisdiction of appeals from all final decisions" of the district courts, "except where a direct review may be had in the Supreme Court."

must ordinarily raise all claims of error in a single appeal following final judgment on the merits.'" *Flanagan* v. *United States*, 465 U.S. 259, 263 (1984) (quoting *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981)). The finality requirement serves important interests in the efficient administration of justice. It protects the continuity and coherence of the presentation of claims in the trial courts. *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 430 (1985); *Flanagan*, 465 U.S. at 263-264. It respects the autonomy and discretion of district judges to conduct litigation free from micromanagement by the courts of appeals. See 465 U.S. at 264-265. It prevents costly, time-consuming, piecemeal appeals that delay relief in meritorious cases, and that might prove moot once final judgment is entered. *Flanagan*, 465 U.S. at 264; *Firestone*, 449 U.S. at 374. The final-judgment rule also ensures that appellate review, when it takes place, occurs on a full record, thereby increasing the likelihood of accurate appellate decisions. *DiBella* v. *United States*, 369 U.S. 121, 129 (1962).

The finality rule does not, however, preclude all review of pretrial orders. In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), the Court stated that the finality rule should be given a "practical rather than a technical construction." Appeals from particular categories of orders are authorized under *Cohen* where doing so comports with the purposes of the finality requirement. Whether appeal should be allowed in a given set of circumstances requires a balancing of interests: "[I]n deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the order.'"

Gillespie v. *United States Steel Corp.*, 379 U.S. 148, 152-153 (1964) (quoting *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)).

This Court in *Mitchell* recognized that, in the qualified-immunity context, the policy of the finality rule to defer appellate review until the end of a case is sometimes outweighed by the danger that such deferral will unnecessarily subject public officials to trial. *Mitchell* turned on the recognition that qualified immunity has a procedural as well as a substantive component.[6] Qualified immunity is concerned not only with protecting public officials from personal *liability* for claims based on law that is not well established; it also aims to ensure "the dismissal of insubstantial lawsuits *without trial*." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982) (emphasis added).[7]

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[6] 472 U.S. at 527 (reasoning that "it follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits" and therefore collateral under *Cohen*); see also *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 114 S. Ct. 1992, 1997 (1994) (referring to "dual rights" under *Mitchell* consisting of both a defense to liability and a right not to stand trial).

[7] See also *Mitchell*, 472 U.S. at 525 (referring to qualified immunity as encompassing the "entitlement not to stand trial under certain circumstances"); *Harlow*, 457 U.S. at 808 ("[In *Butz* v. *Economou*, 438 U.S. 478, 507-508 (1978)] we emphasized our expectation that insubstantial suits need not proceed to trial"); *id.* at 813 ("public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial"); *id.* at 814-815 (adjustment of the "good faith" standard is required to ensure "dismissal of insubstantial lawsuits without trial"); *id.* at 818 (standard announced "should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment").

Qualified immunity seeks to avoid, wherever possible, "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell*, 472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 816). Thus, to protect the right of a public official not to be tried on a claim of violation of rights dependent on unsettled law, *Mitchell* held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." 472 U.S. at 530.

The issue in this case differs from the question resolved in *Mitchell* in two ways. First, the type of summary judgment order at issue here is less plainly separate from the merits of the case than was the order in *Mitchell*. As Judge Kozinski expressed the point in *Velasquez* v. *Senko*, 813 F.2d 1509 (9th Cir. 1987), the defendants' claim in that case that they were not present at the scene of the alleged warrantless INS raids

> is much different from that held to be appealable in *Mitchell*. Nowhere do appellants claim that the law they are accused of violating was not clearly established. Instead, they present a distinct factual issue, inextricably bound up in the underlying claim: whether the defendants were present at the raids and the extent to which they participated in or directed the operations. An ordinary summary judgment motion of this type is not automatically transformed into a qualified immunity claim merely because defendants are federal officials. The appeal does not present a

> purely legal issue, separable from the merits, as *Mitchell* requires.

Id. at 1511. Judge Easterbrook in *Elliott* v. *Thomas*, 937 F.2d 338, 341 (7th Cir. 1991), cert. denied, 502 U.S. 1074, 1121 (1992), similarly pointed out that, although "[b]y sleight of hand you can turn any defense on the merits into a defense of qualified immunity," the question "whether the defendants did the deeds alleged * * * is *precisely* the question for trial." The Seventh Circuit thus held, in this case as in *Elliott*, that an interlocutory appeal is available only to assert that the defendants acted in an area of legal uncertainty, not to assert that they did not act wrongly at all. *Ibid.*

A second way in which this case differs from *Mitchell* is in the nature of the appellate review it seeks. *Mitchell* emphasizes that a denial of qualified immunity is appealable "to the extent that it turns on an issue of law." 472 U.S. at 530; see also *id.* at 528 n.9 ("We emphasize at this point that the appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law."). As then-Judge Breyer explained in his dissent in *Unwin* v. *Campbell*, 863 F.2d 124 (1st Cir. 1988), however, in a case like the present one "[t]he only 'legal issue' that the district court has decided is the peculiarly fact-bound legal issue of 'evidentiary sufficiency.'" *Id.* at 137. Judge Breyer acknowledged that, "[o]f course, 'sufficiency of the evidence' is a question of law," but reasoned that *Mitchell*'s references to issues of law

> must mean to *distinguish* other, more purely legal questions *from* just this kind of 'evidence-sufficiency' question. The Court's language would

> be meaningless otherwise, since *every* judicial act and *every* appeal involve decision of, or challenge to, a question of law. That is to say, unless the Court is distinguishing fact-based 'evidence-sufficiency' questions from *other* legal questions, it is not making an distinction at all.

Id. at 139.

B. This Case, Like *Mitchell*, Implicates A Qualified-Immunity Right Not To Stand Trial Unnecessarily

Despite the differences between the appellate issue in *Mitchell* and the appellate issue here, interlocutory appeal in the present context is supported by *Mitchell*'s reasoning, and *Cohen* is applicable here as well. That is so because a distinct, procedural immunity right not to be tried unnecessarily is no less at stake when a district court errs in denying a summary judgment motion when the evidence is insufficient than when it errs in concluding that the pertinent law was clearly established. Both situations deal with the denial of the qualified-immunity right to avoid an unnecessary trial. The Seventh Circuit held that there is no such "separate 'right not to be tried' on the question whether the defendants did the deeds alleged," *Elliott*, 937 F.2d at 341. We contend, however, that this Court's qualified-immunity decisions recognize such a right, and that interlocutory review is an appropriate means to protect it.

The Seventh Circuit's view—that the qualified-immunity "entitlement not to stand trial" is limited to circumstances in which the defendant's entitlement to prevail prior to trial rests entirely on the lack of clarity in the law[8]—conceives of qualified immunity

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[8] See *Elliott*, 937 F.2d at 341 ("the interlocutory appeal to vindicate the right not to be tried is unavailable when there is no legal uncertainty").

too narrowly. This Court's decision in *Harlow* "presupposed" a more general entitlement to "the dismissal of *insubstantial lawsuits* without trial." 457 U.S. at 814 (emphasis added). For the reasons *Harlow* sets forth it is, from the perspective of the purposes of the immunity, just as important to protect against trial of claims when their insubstantiality is evidentiary as when they fail because they are based on an unclear state of the law. It would be odd to elevate the procedural protection to which an official is entitled when he acts in an area of legal uncertainty—and does something illegal but not clearly illegal—over the procedural protection to which the official is entitled when he or she simply has done nothing wrong at all.[9]

C. *Cohen* v. *Beneficial Indus. Loan Corp.* Is Applicable In The Present Situation

Under *Mitchell*, the protection of the right not to be tried is collateral to the merits and appealable un-

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[9] The Seventh Circuit's narrow interpretation of the procedural protection afforded by qualified immunity also conflicts with the repeated references in *Harlow* to the entitlement to pretrial dismissal of "insubstantial" suits. See p. 12 & n.7, *supra*. As a literal matter, claims dismissed solely because they depend on law that was not clearly established are not "insubstantial" claims. *Harlow*'s grant of qualified immunity from claims based on unsettled law rests on the assumption that the underlying conduct was unlawful—*i.e.*, that the claim was *not* "insubstantial"—but that, for policy reasons based on the unclear law at the time, the claim should nonetheless not support liability for damages. Cf. *Wyatt* v. *Cole*, 112 S. Ct. 1827, 1836 (1992) (Kennedy, J., concurring) ("To cast the issue in terms of immunity * * * is to imply that a wrong was committed but that it cannot be redressed."). Petitioners' position in this case is that they have a right not to stand trial because no wrong was committed.

der *Cohen*. If there is, as we believe, a qualified-immunity right not to be subjected to trial on factually baseless claims, the *Cohen* test applies here in much the same manner as in *Mitchell*. In order to be appealable under *Cohen*, a trial-court order must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) produce a decision that is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978); *Flanagan*, 465 U.S. at 265. See *Cohen*, 337 U.S. at 546. The three *Cohen* factors are satisfied here, as in *Mitchell*, by the collateral and final nature of the qualified-immunity right not to be tried on factually insubstantial claims.

First, denial of summary judgment when such a motion is based on factual insubstantiality has the same effect in conclusively determining the disputed question as denial of a claim that the right plaintiff asserts was not clearly established. Such a denial finally and formally rejects the officials' claim to be free from the burdens of trial. As the *Mitchell* Court held, "the court's denial of summary judgment finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations, and because '[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred,' it is apparent that '*Cohen*'s threshold requirement of a fully consummated decision is satisfied' in such a case." 472 U.S. at 527 (quoting *Abney* v. *United States*, 431 U.S. 651, 659 (1977)).

Second, here, as in *Mitchell*, the right to avoid an unnecessary trial cannot be restored on post-trial appellate review. The aspect of qualified immunity "is an *immunity from suit* rather than a mere de-

fense to liability" is "effectively lost if a case is erroneously permitted to go to trial." 472 U.S. at 526. The district court's decision as to that issue is thus "effectively unreviewable on appeal from a final judgment." *Id.* at 527.

The third prong of *Cohen* concerns whether the issue sought to be appealed is distinct from the merits of the underlying claim. In one sense, a ruling regarding the sufficiency of the evidence is closely intertwined with the merits, because it addresses the substantive viability of the plaintiff's claim. As Judge Arnold pointed out in *Wright* v. *South Arkansas Regional Health Center, Inc.*, 800 F.2d 199 (8th Cir. 1986), however, an order denying summary judgment may be characterized as separate from the merits, because the issue is not whether defendant in fact committed the challenged acts, "but, rather, whether, when all the facts are viewed in the light most favorable to plaintiff, there is any genuine issue, triable to a jury," on that issue. *Id.* at 203. Summary judgment addresses whether threshold preconditions of trial have been met. It does not seek to make the ultimate determination of what actually occurred. See also *Anderson* v. *Roberts*, 823 F.2d 235, 238 (8th Cir. 1987); *Burgess* v. *Pierce County*, 918 F.2d 104, 106 n.3 (9th Cir. 1990).

The fact that an appellate court must canvass the sufficiency of the evidence in order to decide the appeal in a case like the present one should not result in denial to public officials of the right to take an interlocutory appeal of a decision denying the qualified-immunity right not to stand trial. The courts of appeals routinely consider and adjudicate similar issues on appeals from the grant of motions for summary judgment. In addition, appellate review of pre-

trial orders regarding whether the law is clearly established—review that is concededly available under *Mitchell*—may, in some instances, be equally or even more "fact-bound" than review of a claim of evidentiary insufficiency as straightforward as the one in this case. See, *e.g.*, *Anderson* v. *Creighton*, 483 U.S. 635, 640-641 (1987) (referring to the question whether a reasonable officer could have believed the challenged search was lawful, in light of clearly established law and the information the officers in the case possessed, as "fact-specific"); *Unwin*, 863 F.2d at 132 ("After *Anderson*, a district court is required to examine whether facts gathered through discovery (including facts concerning a defendant's conduct) create a genuine issue of fact regarding the issue of qualified immunity.").

D. The Decision Below Rests On An Impracticable Distinction Between Those Orders That Are Subject To Interlocutory Appeal And Those That Are Not

The Seventh Circuit's rule should also be rejected because it is extremely difficult, and perhaps impossible, to implement with consistency. In many cases there will, in practice, be no meaningful distinction between denials of summary judgment based on whether a right was clearly established and denials based on an insufficiency of evidence. Thus, the court of appeals held in this case that a defendant official cannot appeal on an interlocutory basis to challenge a plaintiff's failure of proof on a claim of a violation of a clearly established right. The only permissible qualified-immunity interlocutary appeal, in the court's view, is one asserting that the right at issue was not clearly established at the time of the challenged

conduct. The former type of appeal can, however, readily be recharacterized as the latter.

For example, the officers' contention in this case was that the district court erred in finding the evidence sufficient to support a claim of excessive force where there was no such evidence. Their appeal could have been framed, however, as a contention that respondent's evidence showed only force commensurate with legitimate law enforcement needs. As such, the appeal would have raised the contention that respondent's claim did not rest on the violation of a clearly established right (since there is no clearly established right to be free from a use of force appropriate to the circumstances). Similarly, the magistrate judge's disposition of the false-arrest claims in this case, over which the court of appeals exercised interlocutory appellate jurisdiction, could have been characterized as an order about sufficiency of the evidence (*i.e.*, as an order that respondent did not present a factual basis for finding that the officers lacked probable cause) and therefore as non-appealable under the Seventh Circuit's rule. Judge Easterbrook made essentially this same observation in *Elliott* when he pointed out that "[b]y sleight of hand you can turn any defense on the merits into a defense of qualified immunity." 937 F.2d at 341. The distinction made by the holding of *Elliott* is unworkable in practice precisely because there is no solution—and the *Elliott* opinion offers none—to the problem of how courts could distinguish "genuine" qualified-immunity appeals from those that result from "sleight-of-hand." [10]

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[10] This Court's decision in *Siegert* v. *Gilley*, 500 U.S. 226 (1991), also supports interlocutory appellate jurisdiction under the circumstances of this case. The Court in *Siegert* held that a plaintiff who has failed to plead a violation of a con-

II. AUTHORIZATION OF APPELLATE JURISDICTION HERE WOULD NOT IMPOSE UNMANAGEABLE BURDENS ON THE COURTS

Experience suggests that recognizing appellate jurisdiction over interlocutory appeals when summary judgment is denied despite the absence of factual support for the plaintiff's claims would not generate an unmanageable number of additional appeals. Several circuits currently allow interlocutory qualified-immunity appeals in such cases.[11] Those circuits do

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stitutional right by a public official has also failed to state a claim of a violation of a clearly established right. The same analysis that *Siegert* thus applied to the allegations of the complaint at the pleading stage can and should also be applied to the evidence at the summary judgment stage: A plaintiff who fails to present evidence supporting a claim of a violation of a constitutional right by a public official has necessarily also failed to present a claim of a violation of a clearly established right by that official. In order to decide whether the plaintiff has presented a violation of a clearly established right, either as a matter of pleading or of proof, the court must know what the challenged conduct is. A question that thus comprises "an analytically earlier stage of the inquiry into qualified immunity," *Siegert*, 500 U.S. at 227—such as whether the allegations (as in *Siegert*) or the evidence supporting them (as here) make out a violation of any right at all—should be subject to the same right of interlocutory appeal. See *Kelly* v. *Bender*, 23 F.3d 1328, 1330 & n.1 (8th Cir. 1994) ("closely related issues of law," the resolution of which "would dispose of the immunity question," are appealable).

[11] See, *e.g.*, *Unwin*, 863 F.2d at 132 ("[Under *Mitchell*], we have jurisdiction to review a district court's denial of qualified immunity on grounds that a genuine issue of material fact exists as to the factual predicate of a qualified immunity claim."); *Kelly*, 23 F.3d at 1330 ("We have jurisdiction over this appeal because, although largely fact-based, it presents the legal question whether [plaintiff] raised a genuine issue

not appear to be overburdened with qualified-immunity appeals. Moreover, interlocutory appeals may also produce counterbalancing efficiencies in the government functions that qualified immunity is intended to protect, and in reducing district court caseloads through prompt appellate review of decisions erroneously allowing cases to remain on the docket.

The courts have various methods for managing appellate caseloads to help ensure that interlocutory appeals will not detract from overall judicial efficiency. For example, rules in several circuits authorize district courts to certify to the court of appeals that a qualified-immunity appeal is frivolous. See, *e.g.*, *Apostol* v. *Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989) (Easterbrook, J.) (district court may certify in writing that immunity appeal is frivolous); *Yates* v. *City of Cleveland*, 941 F.2d 444, 448-449 (6th Cir. 1991) (accord); *Stewart* v. *Donges*, 915 F.2d 572,

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of material fact regarding whether the [defendants'] conduct violated his clearly established rights."); *Burgess*, 918 F.2d at 106 n.3 ("on appeal from a denial of summary judgment after discovery the court must consider whether there is a genuine issue of fact as to whether defendant engaged in the conduct violating plaintiff's clearly established constitutional right"); *Wright*, 800 F.2d at 203 (sufficiency of the evidence may be tested on appeal; "[i]f this is a step beyond *Mitchell*, it is a small one, and one fully consistent with the spirit and purpose of the Supreme Court in that opinion. It is important for public officials to be shielded from the burden of trial on insubstantial claims. Their right not to be forced to trial will be lost if an immediate appeal is not allowed."). See also *Febus-Rodriguez* v. *Betancourt-Lebron*, 14 F.3d 87, 90 (1st Cir. 1994) ("we must review the record and examine the discovered facts regarding the conduct of [the defendants], and determine whether a genuine issue does or does not exist concerning qualified immunity"); *DeVargas* v. *Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988); *Turner* v. *Dammon*, 848 F.2d 440 (4th Cir. 1988).

576-577 (10th Cir. 1990) (accord); *Chuman* v. *Wright*, 960 F.2d 104, 105 (9th Cir. 1992) (accord). As this Court has pointed out, frivolous interlocutory appeals "may be weeded out by summary procedures." *Richardson* v. *United States*, 468 U.S. 317, 322 (1984).[12]

In order to ameliorate the potential prejudicial delay to persons seeking to vindicate their rights through *Bivens* or Section 1983 suits, courts can also expedite interlocutory appeals. Obvious errors can be promptly corrected by summary reversal. Several circuits also have rules limiting the number of pretrial immunity appeals. The Ninth, Seventh, and First Circuits permit only one such appeal in each case.[13] Other courts permit up to two interlocutory

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[12] See also *DeVargas*, 844 F.2d at 720 ("No doubt some interlocutory appeals of denials of qualified immunity defenses will be frivolous, as when affidavits or depositions in evidence, if believed, clearly support factual claims of violations of established law. That some interlocutory appeals may be frivolous, however, does not affect whether we have jurisdiction. These appellants or their counsel can be sanctioned for taking a frivolous appeal.").

[13] See, *Pelletier* v. *Federal Home Loan Bank of San Francisco*, 968 F.2d 865, 871 (9th Cir. 1992) ("One [qualified immunity] interlocutory appeal is all that a government official is entitled to and all that we will entertain."); *Nelson* v. *Silverman*, 999 F.2d 417, 419 (9th Cir. 1993) (accord); *Abel* v. *Miller*, 904 F.2d 394, 395 (7th Cir. 1990) ("*Mitchell does not* contemplate sequential appeals"); *Kaiter* v. *Boxford*, 836 F.2d 704, 707-708 (11th Cir. 1988) (accord); see also *Velasquez*, 813 F.2d at 1512 (Hall, J., concurring) (finding no jurisdiction over interlocutory appeal because order denied summary judgment without prejudice, and thus did not finally dispose of right not to stand rule). The Ninth Circuit's one-appeal rule is the subject of a pending petition for a writ of certiorari, see *Behrens* v. *Pelletier*, No. 94-1244 (filed Jan. 20, 1995).

qualified-immunity appeals.[14] These various mechanisms can be effectively used to ensure that interlocutory appeals do not unreasonably postpone trial on the merits of valid claims.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[14] See *Kulwicki* v. *Dawson*, 969 F.2d 1454, 1460 n.5 (3d Cir. 1992) (stating that *Mitchell* permits appeal at "either or both" the motion to dismiss or the summary judgment stage); *Sinclair* v. *Schriber*, 834 F.2d 103, 104-105 (6th Cir. 1987) (*Bivens* defendant has "two bites out of the appellate apple, at the pleading and at the discovery stage").

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